2013 IL App (2d) 120415-U
No. 02-12-0415
Order filed December 31, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-3271
	)	
ERIC O. STEWARD, JR.,	)	Honorable
	)	Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* A reasonable fact finder could conclude that defendant's actions did not constitute self defense; the State's argument did not improperly refer to prior consistent statements; but defendant is entitled to a new sentencing hearing as trial court relied on a version of events in sentencing defendant that it erroneously concluded that the jury must have found existed.

¶ 2 I. INTRODUCTION

¶ 3 Following a jury trial in the circuit court of Winnebago County, defendant, Eric O. Steward, Jr., was convicted of aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2010)) and mob action (720 ILCS 5/25-1 (West 2010)). Defendant was acquitted of felony murder. Defendant was

tried with a codefendant, Alex Perry. Defendant now appeals, raising four issues. First, he argues that the State failed to prove that his use of force was not justified (*e.g.*, self defense). Second, defendant asserts that the State's closing argument was unfairly prejudicial in that it referenced prior consistent statements by one of the State's witnesses that the trial court had ruled were inadmissible. Third, defendant claims that the trial court erred during sentencing by assuming "the existence of aggravating facts that were not supported by the jury's verdicts." Fourth, defendant contends that he is entitled to a credit against various fees and fines and that others were improperly imposed, propositions with which the State agrees. We affirm in part, vacate defendant's sentence, and remand with instructions.

¶ 4 The parties are aware of the evidence presented at trial, and we will not restate it here. Rather, as the issues presented are wholly discrete, we will discuss the evidence as it pertains to the issues. However, we set forth the following overview to facilitate an understanding of this appeal.

¶ 5 II. BACKGROUND

¶ 6 This case involves a series of events occurring during the early morning of September 18, 2010. Calvin Graves was staying at his aunt's house at 1128 Blaisdell in Rockford. At about 2:30 a.m., he and an individual named Chris walked down the street in the direction of 1118 Blaisdell. At that address, they encountered a group of people. The group of people were drinking, and Graves asked if he could contribute some money and have something to drink. Words were exchanged, and three individuals (defendant, Perry, and Dewaun Bryant) jumped Graves and pistol whipped him.

¶ 7 What happened next is in dispute. The State's version, based largely on Graves' testimony, is that during the altercation, Bryant dropped his gun. Graves picked it up. The group backed off from Graves. Defendant fired a shot at Graves, and Graves fired back. Graves then jogged

backward towards his aunt's house. The group of three ran to their car and pursued Graves down the street. There was an exchange of gunfire. When Graves ran out of bullets, he ran through a gangway and went to another house. Graves later learned that the car had crashed.

¶ 8 Defendant's version differs. According to defendant, based on witnesses testifying on his behalf, after the altercation between Graves and the group of three, Graves returned to his house. As he departed, Graves stated, "That's what you guys own." While there, Graves apparently procured a gun. About five to ten minutes later, defendant, Perry, and Bryant got in a car to leave. As the car backed out of the driveway, a shot was fired from the right side of the car (the direction of Graves' aunt's house). Defendant continued to back out and proceeded toward Grave's aunt's house. The car swerved and struck a fire hydrant.

¶ 9 After the car crashed, defendant drove to Rockford Memorial Hospital. During the exchange of gunfire, Bryant had been shot in the head. The gunshot entered the right side of Bryant's head between his ear and eyebrow and exited above his left ear. Bryant died as a result of the wound. A forensic pathologist testified that, more likely than not, the wound would have rendered Bryant unconscious immediately.

¶ 10 Shell casings were recovered from the road, the inside of the car, and the front porch at Graves' aunt's house. A firearm and tool-mark expert testified that the casings found in the car and on the roadway were fired from the same weapon. Those found on the porch, however, were fired from a different gun.

¶ 11 II. ANALYSIS

¶ 12 We now turn to the issues raised by defendant. As we explain below, we find none of them persuasive, save the final issue which the State concedes.

¶ 13 A. SELF DEFENSE

¶ 14 We first turn to defendant's claim that the State failed to prove that the use of force upon which his aggravated-discharge-of-a-firearm conviction (720 ILCS 5/24-1.2 (West 2010)) is based was not a justified response to an assault by Graves. Generally, a use of force is justified if a person "believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2010). Self defense is an affirmative defense, the elements of which are:

> "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *People v. Lee*, 213 Ill. 2d 218, 224-25 (2004).

If the State negates any one of these elements, the defense fails. *Id*. at 225. Moreover, "[t]he right of self-defense does not justify an act of retaliation or revenge." *People v. Woods,* 81 Ill. 2d 537, 543 (1980). Finally, as this appeal comes to us following a jury trial, we will not set aside a conviction unless "evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We must view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

¶ 15 As framed by the parties, the issue is whether defendant was an aggressor, for an aggressor may not avail himself of the defense of self defense (See *People v. Bloominburg*, 346 Ill. App. 3d 308, 316 (2004)). Under the State's version of events, defendant is the aggressor, as all events

flowed from the initial attack upon Graves, where Graves was pistol whipped. Pursuant to defendant's version, he is not the aggressor, as, following the initial assault, Graves withdrew to a place of safety and later attacked the group, firing gunshots into the car. On defendant's version, he simply fired back in response to Graves' attack. The jury could have resolved this conflict in favor of the State. However, defendant points out some legitimate questions regarding such a resolution, most significantly, how Bryant, who was sitting in the passenger seat, could have been shot in the right side of the head as the car proceeded down the street (defendant notes that if Bryant was shot while in the car, he would have had to be facing backwards–an implausible proposition that is further undermined by the locations where blood was found in the car, and if Bryant was shot outside of the car, the nature of his wound and the testimony of the pathologist that the wound would have likely rendered him unconscious, made it implausible that he would have jumped into the car to pursue Graves after being shot).

¶ 16 However, we do not believe that the resolution of this factual dispute is dispositive of this issue. Under the State's version, defendant is the aggressor and not entitled to invoke the defense of self defense. *Bloominburg*, 346 Ill. App. 3d at 316. Moreover, even if defendant's version were accepted, the jury would not have been compelled to acquit defendant. Quite simply, the jury could have concluded that following the shooting of Bryant, defendant's actions constituted revenge or retaliation rather than self defense. Self-defense is not an available defense in such circumstances. *Woods,* 81 Ill. 2d at 543. Following the shooting, defendant backed out and drove toward Graves, thus escalating the conflict. Instead of simply defending himself, defendant sought to carry the battle to Graves. As noted above, one of the elements of a claim of self defense is that "the use of force was necessary." *Lee*, 213 Ill. 2d at 225. The jury could have concluded that defendant's actions

were not necessary. We do not believe that our holding runs afoul of the rule that an individual need not retreat, if possible, before using force. See *People v. Willis*, 210 Ill. App. 3d 379, 382 (1991). By backing out and proceeding toward Graves, defendant was not simply standing his ground.

¶ 17 In sum, the jury could have reasonably concluded that defendant's actions were not necessary. As such, given the standard of review that controls our analysis, we are compelled to affirm its decision.

¶ 18 B. PRIOR CONSISTENT STATEMENTS

¶ 19 Defendant next argues that the State improperly bolstered Graves' credibility by purportedly alluding to certain prior consistent statements during the rebuttal portion of its closing argument. Graves was initially arrested in connection with the incident at issue in this case. Following his arrest, he made a number of statements to the police. The defense pointed out inconsistencies between these statements and Graves' trial testimony to the jury. During rebuttal, the State pointed out portions of Graves' testimony that was not impeached by any prior inconsistent statement (*i.e.*, "He did not say that Calvin never told the police that three people jumped him."). The trial court had previously ruled that the State could not use such prior consistent statements, as Graves had not been impeached (and any motive to fabricate would have already existed at the time).

¶ 20 It is axiomatic that a prior consistent statement is generally not admissible. *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000). An exception exists where it is suggested that a witness's testimony is recently fabricated and the statement was made before the time the motive to fabricate arose. *People v. Henderson*, 142 Ill. 2d 258, 310 (1990). The exception does not apply in this case. Whether a remark made during closing argument is improper is reviewed using the abuse of discretion standard. *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009). Thus, we will reverse

only if no reasonable person could agree with the trial court's decision. *Shaw v. St. John's Hospital*, 2012 IL App (5th) 110088, ¶ 18. Defendant also suggests that we review the *effect* of a series of improper remarks *de novo* (see *Id.*); however, given our resolution of this issue, we need not consider this proposition.

¶ 21 Defendant complains of the following remarks:

> "The defense has tried to tell you that Calvin's statements to the police were completely inconsistent with everything that he testified to today -- or Tuesday.
>
> * * *
>
> The defense says Calvin never told the police that he got the gun when Wannie dropped it. *** [Y]ou heard no evidence that he did not tell the police that he picked up the gun when someone dropped it. The defense tried to say that Tuesday's testimony was the first time that he ever said there were two guns. There's no evidence that that's true. No one said he didn't tell the police that he picked up that gun when someone dropped it during the beating. Detective Jiminez didn't say he never said that. *** To say [this is] the first time anyone has ever heard the two-gun story is ridiculous. That's not what the evidence shows. That's not what was presented to you.
>
> I believe it was [codefendant's counsel] who said we know what Calvin said to the police. No, we know what they say Calvin didn't say to the police. What did the defense say was not inconsistent? * * *
>
> What did they not say that Calvin said something else before?
>
> * * *
>
> [an objection by defense counsel was overruled at this point]

He did not say that Calvin never told the police that [defendant] got mad. He did not say that Calvin never told the police that three people jumped him, beat him, and pistol whipped him. Did not say that Calvin never told the police that he picked up the gun after it was dropped in the beating. Did not say that Calvin never told the police that he ran back toward 1128 Blaisdell. Did not say that Calvin never told the police that [defendant] fired the first shot. Did not say that Calvin never told the police that he fired back in return. Did not say that Calvin never told the police that the white Cadillac then came and followed him down the street. Did not say that Calvin never told the police that they fired from the Cadillac -- or [defendant] fired from the Cadillac as it was driving down the street. Did not say that Calvin never told the police that he again returned fire.

* * *

[the trial court noted a continuing objection on behalf of the defense]

The defense pointed out to you every little thing that they possibly could that they believe contradicted what Calvin Graves said before. If any of those things contradict what he said before, you can bet that they would have pointed it out."

¶ 22 We fail to see anything in the comments defendant complains of that amount to an assertion that any particular portion of Graves' trial testimony was corroborated by any specific statement Graves made to the police. Defendant argues, in essence, that the State's pointing out of portions of Graves' testimony that was not contradicted by a prior statement was tantamount to asserting that a prior consistent statement existed on that point. That is, on defendant's theory, by stating that Graves was not impeached because defense counsel never said Graves did not tell the police that three people jumped him is the same as saying that Graves did tell the police that three people

jumped him. Keeping in mind the standard of review, a reasonable person could conclude that these two propositions are not equivalent. Quite simply, stating that defendant's testimony was unimpeached is not the same as saying that it was corroborated.

¶ 23 In *People v. Chapman*, 156 Ill. App. 3d 29, 33-34 (1987), a somewhat similar situation arose:

> "The second reference to the fact that Bonneville made prior consistent statements is contained in the prosecutor's closing argument. The prosecutor stated in relevant part:
>
> > 'And during the course of all these stories that he tells, people are writing them down, they are taking notes, they are comparing police reports, making notations of everything that he says about this incident. At least four times he repeats this story over the course of the last seven months. And my point is that there was something you did not hear in this courtroom about those stories that he told, about his report of the incident over and over again. You did not hear Francis Bonneville impeach-
> >
> > [defendant's objection overruled].
> >
> > * * *
> >
> > Once again, what did you not hear in court? You did not hear any substantial contradiction during the cross-examination of the witness or at any other time, no impeachment of him about what happened on the day in question.'
>
> The trial court overruled defense counsel's objection to this argument, indicating that the State could argue that the defendant did not impeach Bonneville's testimony. Our interpretation of the argument is consistent with the trial court's views. Courts have held that a prosecutor may comment that the State's witnesses were not impeached or contradicted as long as they do not draw attention to the fact that the defendant chose not to testify."

Like the *Chapman* court, we decline to equate pointing out that testimony is unimpeached with asserting that it is corroborated by a prior statement under the circumstances presented here.

¶ 24 Accordingly, we find no error in the State's closing argument. As such, we need not consider the cumulative effect of these statements.

¶ 25 C. SENTENCING

¶ 26 Defendant next contends that his sentence must be vacated and this cause remanded for a new sentencing hearing. He argues that the trial court relied on an improper factor in sentencing. We review a trial court's sentencing decision for an abuse of discretion. *People v. Joe*, 207 Ill. App. 3d 1079, 1085 (1991). Where a trial court relies on an improper factor in aggravation, "a court of review must remand such a cause for resentencing, except in circumstances where the factor is an insignificant element of the defendant's sentence." *Id.*

¶ 27 Here, the trial court concluded that there were no substantial grounds that would tend to mitigate or excuse defendant's conduct, while falling short of establishing a defense. See 730 ILCS 5/5-5-3.1 (West 2010). It explained:

> "I am making my decision based on the evidence the jury heard, and the jury could have believed, obviously did believe Calvin Graves' testimony that as Calvin Graves attempted to extricate himself from those that were beating him he sought refuge behind some object, attempted to create some distance between himself and those beating him and that shots were fired at him at that time.
>
> The jury believed those facts, found those to be true beyond a reasonable doubt, and on that basis convicted [defendant] of aggravated discharge against Mr. Graves. Although there may be other theories about what happened, that's not what the jury found. The jury

> obviously found that [defendant] had fired at Mr. Graves at or about the time the mob action was concluding or as part of the mob action or immediately upon conclusion of the mob action as Graves tended to flee or extricate himself from his assailants, including Steward and Perry and Bryant.
>
> * * *
>
> That mob action, assuming that you had still decided you were going to advance upon and attack Calvin Graves, you wouldn't have had a gun in your hand that night; this would have been a mere fist fight * * *. Because you did have a gun, you did advance upon him with it, strike him with it and his testimony is believed by the jury that a gun fell from the possession of one of his assailants, gathered it up, sought cover, and shots were directed at him by you, and you put in motion these events. You caused this to happen."

Defendant argues that the trial court's finding the he caused the events that followed the initial assault upon Graves is inconsistent with the jury acquitting him on the felony-murder count.

¶ 28 The trial court relied heavily upon the version of events testified to by Graves, finding that the jury "obviously did believe Calvin Graves' testimony." However, as explained above, the jury could have rejected defendant's claim of self-defense without crediting Graves. We note that the jury returned a general verdict, so it is unknown which theory of the case they relied on in convicting defendant of aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2010)). Under such circumstances, we deem it prudent to vacate defendant's sentence and remand for a new sentencing hearing, as our holding may bear on the issue of provocation by Graves and other relevant sentencing factors. *Cf. People v. Bailey*, 2013 IL 118690, ¶ 19 ("Further, when it is not possible to determine from a general verdict whether the defendant was actually found guilty of each count and when this

lack of specificity has adverse sentencing consequences for a defendant whose request for separate verdict forms was refused, the error is not harmless."). We emphasize, however, that nothing in this decision is intended to constrain the discretion the trial court possesses in sentencing.

¶ 29 D. FEES AND FINES

¶ 30 Finally, defendant argues, and the State concedes, that various fines and fees were either imposed improperly or satisfied by credits to which he was entitled. As we are vacating defendant's sentence and remanding, the trial court will be able to address these issues on remand.

¶ 31 IV. CONCLUSION

¶ 32 In light of the foregoing, we affirm defendant's conviction, but vacate the sentence imposed for his aggravated-discharge-of-a-firearm conviction (720 ILCS 5/24-1.2 (West 2010)). We remand this cause for a new sentencing hearing. The trial court shall also address the propriety of the various fees and fines assessed to defendant and ensure defendant receives any credit he is due.

¶ 33 Affirmed in part, vacated in part; cause remanded with instructions.